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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 HAKKASAN LV, LLC *et al.*,

11 Plaintiffs,

12 v.

13 BEN HAKIM, an individual,

14 Defendant.
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Case No. 2:13-cv-01544-KJD-PAL

ORDER

16 Presently before the Court is Defendant Ben Hakim's (Defendant) Motion for Relief and to
17 Set Aside Clerk's Entry of Default and Default Judgment (#27). Plaintiffs Hakkasan LV, LLC *et al.*,
18 (Plaintiffs) filed a response in opposition (#38) to which Defendant replied (#40). Also before the
19 Court is Defendant's Motion to Quash Summons Issued and Complaint (#28) and Motion to Dismiss
20 Action (#29). Plaintiffs filed a response in opposition (#37) to which Defendant replied (#41).

21 **I. Background and Procedural History**

22 On August 27, 2013 Plaintiffs filed a complaint against Defendant alleging cybersquatting,
23 trademark infringement, counterfeiting, and unfair competition under federal statutes, associated with
24 Defendant's creation of the website <www.hakkasannightclub.com> and illegal use of Hakkasan
25 trademarked insignia. On August 30, 2013, the Court granted Plaintiffs a temporary restraining order
26 (#9) in which it stated, "Plaintiffs may, in addition to the requirements set forth in Rules 4 and 5 of

1 the Federal Rules of Civil Procedure, serve the Motion, this Order and all other pleadings filed to
2 date on Defendant by electronic mail transmission.” Plaintiffs interpreted this statement to mean
3 electronic service alone was sufficient to meet the requirements of service. On September 13, 2013,
4 Plaintiffs filed Notice of Service by Email (#10).

5 The Court entered a Permanent Injunction and Default Judgment on July 10, 2014 (#22).
6 Defendant claims no notice of the lawsuit whatsoever until he was served with an Order to Examine
7 Judgment Debtor (#25) on November 10, 2014. Defendant filed the present motions on December
8 16, 2014.

9 II. Motion to Set Aside Default Judgment

10 A. Legal Standard

11 The Court may set aside entry of default for good cause, and it may set aside a default
12 judgment under Rule 60(b). See Fed. R. Ci. P. 55(c). The Court considers three factors in analyzing
13 good cause: (1) whether Defendant engaged in culpable conduct leading to the default; (2) whether
14 Defendant has a meritorious defense; and (3) whether vacating the entry of default would prejudice
15 Plaintiff. See Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 926
16 (9th Cir. 2004). The law favors deciding a case on its merits. See id. at 925. Thus, a default judgment
17 is appropriate only in extreme circumstances. See TCI Group Life Ins. Plan v. Knoebber, 244 F.3d
18 691, 696 (9th Cir. 2001). For the reasons stated *infra*, the Court finds that Defendant has shown good
19 cause to vacate the entry of default.

20 B. Culpable Conduct

21 When examining culpable conduct, the court concurrently examines any excusable neglect of
22 the defaulting party. See Franchise Holding II, LLC, 375 F.3d at 925. Defendant’s conduct is
23 culpable if he “received actual or constructive notice of the filing of the action and failed to answer”
24 or otherwise defend. Direct Mall Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685,
25 690 (9th Cir. 1988). Defendant’s failure to answer, however, may be excused depending on the
26 reason for the delay if Defendant acted in good faith. See TCI Group Life Ins. Plan v. Knoebber, 244

1 F.3d 691, 696 (9th Cir. 2001). Further, conduct is culpable only where the explanation of the default
2 is consistent with a devious, deliberate, willful, or bad faith failure to respond. See Employee
3 Painter's Trust v. Ethan Enters., 480 F.3d 993, 1000 (9th Cir. 2007).

4 Here, Plaintiffs argue service was thwarted by Defendant's malfeasance. Plaintiffs allege
5 Defendant was lying, having others lie for him, and intentionally trying to stop receipt of service by
6 failing to provide a complete address. However, Defendant states he was not intentionally evading
7 service, but rather was unaware of any service attempts at all. In his Declaration in Support of Ex
8 Parte Application (#30), Defendant stated, "The first time I heard of this action was upon being
9 served an Order for Judgment Debtor's Examination on December 18, 2014." Additionally, the email
10 receipt of electronic service provided by Plaintiffs shows only that Defendant's email account
11 received the email of service, but that the email was not opened. This fact presents a defense to
12 actual or constructive notice. While Defendant's actions may appear questionable, Rule 55(c) entitles
13 him to the presumption that he acted in good faith to allow the case to be decided on its merits.

14 Further, Plaintiffs did not take all reasonable measures to effect service. Plaintiffs allege
15 numerous attempts, but only offer proof of one failed attempt to serve Defendant on September 15,
16 2013. Additionally, Plaintiffs did not exploit all alternative methods of service, such as mailing
17 service to Defendant's dwelling, or serving Defendant by publication. See Fed. R. Civ. P. 5(b)(2)(C).
18 While the Court does have some reservation about Defendant's conduct, Defendant provides a good
19 faith alternative to contributing culpability which is inconsistent with a devious, deliberate, willful,
20 or bad faith failure to respond. Accordingly, this factor weighs in favor of setting aside the default.

21 C. Meritorious Defense

22 To succeed on a motion to set aside a default judgment, Defendant must set forth specific
23 facts that constitute a defense. See Franchise Holding, 375 F.3d at 926. Mere general denial without
24 factual support is not sufficient. See id. Defendant presents two defenses: improper service and lack
25 of personal jurisdiction.
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1 1. Service

2 A court may not exercise power over a party without service of process or waiver of service
3 by the defendant. See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999).
4 Further, an individual or entity is not obliged to engage in litigation unless notified of the action, and
5 brought under a court’s authority, by formal process. See id. at 347.

6 Federal Rule of Civil Procedure (Rule) 4(e)(2) requires delivering a copy of the summons
7 and of the complaint to the individual personally, leaving a copy at the individual’s dwelling with a
8 person of suitable age, or delivering a copy to an agent authorized to receive service of process.
9 Service may be effected and completed by mailing to the person’s last known address, but Rule 5
10 distinguishes between a hard copy mailing and electronic delivery. See Fed. R. Civ. P. 5(b)(2).
11 Electronic means alone without personal service is only sufficient if the recipient has consented in
12 writing to such service. See Fed. R. Civ. P. 5(b)(2)(E). Defendant alleges he was never personally
13 served the summons and a copy of the complaint in accordance with Rules 4 and 5.

14 Plaintiffs’ argument that electronic service alone is sufficient rests on the improper
15 assumption that the Court authorized electronic service as the sole means required to effect proper
16 service. The Court’s statement that “Plaintiffs may, in addition to the requirements set forth in Rules
17 4 and 5 of the Federal Rules of Civil Procedure, serve the Motion, this Order and all other pleadings
18 filed to date on Defendant by electronic mail transmission,” only authorized electronic service *in*
19 *addition to* compliance with Rules 4 and 5.

20 Additionally, Plaintiffs rely on an out of context policy statement from Henderson v. U.S.:
21 that the purpose of service is to supply notice and provide a fair opportunity for a response.
22 Henderson v. U.S., 517 U.S. 654, 672. Plaintiffs misinterpret Henderson’s holding by taking this
23 single line to mean that electronic service alone has replaced the standard of Rules 4 and 5 as long as
24 it provides notice and an opportunity for response— a serious misconstruction. Further, Henderson
25 dealt with conflicting standards of service between the Rules and the Suits in Admiralty Act, in
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1 which the Court held the Rules to be supreme over any conflicting standard. Henderson, 517 U.S. at
2 656.

3 Plaintiffs also improperly rely on Rio Properties, Inc. v. Rio International Interlink to show
4 that electronic service alone has replaced the standards of Rule 4 and 5. See Rio Props. v. Rio Int'l
5 Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002). Rio is distinct, as it dealt with service to a foreign
6 entity who could not be served by conventional means, and was only electronically served after the
7 court sanctioned such alternative methods. See id. at 1013. Here, the Court was clear that electronic
8 service was only appropriate in addition to compliance with Rules 4 and 5, and had not found
9 grounds justifying a modified alternative, as it did in Rio.

10 Plaintiffs' awareness of their false assumption that electronic service was sufficient is
11 supported by their efforts to still effect personal service after electronic service was complete. Had
12 Plaintiffs believed electronic service to be sufficient, there would have been no reason to continue to
13 attempt personal service. Ultimately, Defendant has set forth sufficient facts that, by the lenient
14 standard of Rule 55(c), call validity of service into question. Accordingly, improper service is a
15 meritorious defense.

16 2. Personal Jurisdiction

17 Pursuant to Rule 60(b)(4), a court must set aside a final judgment as void if the court lacked
18 jurisdiction over the parties. See Sec. and Exch. Comm'n v. Internet Solutions for Bus., Inc., 509
19 F.3d 1161, 1165 (9th Cir. 2007) (citing U.S. v. Berke, 170 F.3d 882, 883 (9th Cir. 1999)).
20 Defendant's assertion that he lacks the minimum contacts with Nevada to support the exercise of
21 personal jurisdiction is most assuredly not correct. See, e.g., Brayton Purcell LLP v. Recordon &
22 Recordon, 606 F.3d 1124, 1128-31 (9th Cir. 2010).

23 Defendant claims to never have transacted business in Nevada nor held himself out in
24 Nevada's stream of commerce, but alleged facts to support these assertions are underwhelming.
25 Stock statements simply that Defendant is a citizen of California, a resident of Los Angeles County
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1 and does not conduct business within or with the state of Nevada are too general to constitute a
2 defense.

3 In contrast, Plaintiffs presented overwhelming evidence of personal jurisdiction. Specifically
4 of note, Plaintiffs highlighted that Defendant registered a domain name that incorporates the brand of
5 a Las Vegas Company, and Defendant used the geographic location Las Vegas in the domain name.
6 All materials on Defendant's website were meant to misrepresent an affiliation with the Las Vegas
7 nightclub, and as such, constituted the "something more" required to show Defendant directed his
8 internet activity toward Nevada. See Panvision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir.
9 1996) (citing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997)). Accordingly, lack
10 of personal jurisdiction is not a meritorious defense.

11 3. Additional Defenses

12 Defendant alleges three additional defenses in his reply to Plaintiffs' opposition: (1)
13 application of the Fair Use Doctrine, (2) failure to state a cause of action, and (3) that Plaintiffs
14 invited error.¹ All three of these claimed defenses are without merit.

15 Plaintiffs offer direct proof that Defendant was attempting to profit from his appropriation of
16 the Hakkasan name by knowingly and willfully selling counterfeit services, directing customers
17 seeking out Hakkasan services to Hakkasan's competitors, and holding Hakkasan responsible to
18 customer grievances. Additionally, Plaintiffs stated multiple cognizable causes of action in their
19 complaint, including cybersquatting, trademark infringement, counterfeiting, and unfair competition
20 under federal statutes. Further, Defendant's claim that "Plaintiffs' shoddy handling of the service of
21 the summons and complaint" invited error entirely lacks factual support.

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25 ¹The fact that Defendant raised these defenses for the first time in his Reply to Plaintiffs' Opposition
26 (#40) is enough justification to refuse to consider them. See White v. City of Sparks, 341 F.Supp.2d 1129,
1134 (D.Nev. 2004) aff'd, 500 F.3d (9th Cir. 2007).

1 While the majority of Defendant's alleged defenses are hollow, Defendant has presented at
2 least one meritorious defense of improper service. Accordingly, this factor weighs in favor of setting
3 aside the default.

4 D. Prejudice

5 The Rules favor the resolution of cases on their merits when possible. See TCI Group, 244
6 F.3d at 695-96. Here, Plaintiffs have made no showing that setting aside the entry of default will
7 prejudice them. Plaintiffs having to litigate the case on the merits rather than benefitting from entry
8 of a default judgment is not prejudice adequate to deny Defendant's motion. Accordingly, this factor
9 weighs in favor of setting aside the default.

10 III. Motion to Quash Service

11 Rule 4 requires a plaintiff to serve summons with a copy of the complaint. See Fed. R. Civ.
12 P. 4(c)(1). The summons and copy of the complaint must be delivered to the defendant personally,
13 left at the defendant's dwelling with a person of suitable age, or delivered to an agent authorized to
14 accept service on the defendant's behalf. See Fed. R. Civ. P. 4(e)(2). Service of the summons and
15 complaint must be made within 120 days of the filing of the complaint. See Fed. R. Civ. P. 4(m).

16 Plaintiffs have not effected proper service in accordance with Rules 4 and 5. Plaintiffs argue
17 the Court authorized electronic service alone to be sufficient service, but the Court only authorized
18 electronic service *in addition to* compliance with Rules 4 and 5. The 120 day filing period has lapsed,
19 as Plaintiffs filed their complaint August 27, 2013. Accordingly, as Plaintiffs did not meet personal
20 service requirements within the 120 day filing period, Defendant's motion to quash service is
21 granted.

22 IV. Motion to Dismiss Action

23 A motion to dismiss may be granted if there has been insufficient service of process. See Fed.
24 R. Ci. P. 12(b)(5). However, Rule 4(m) provides two avenues for relief where circumstances may
25 allow for a time extension. See Lemoge v. United States, 587 F.3d 1188, 1198 (9th Cir. 2009). The
26 first is mandatory: the district court must extend time for service upon a showing of good cause. In

1 re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001). Good cause to avoid dismissal may be demonstrated
2 by establishing, at minimum, excusable neglect. See Lemoge, 587 F.3d at 1198 n.3 (citing Boudette
3 v. Barnette, 923 F.2d 754, 756 (9th Cir. 1991)). In addition to excusable neglect, a plaintiff may be
4 required to show the following factors to bring the excuse to the level of good cause: “(a) the party to
5 be served personally received actual notice of the lawsuit; (b) the defendant would suffer no
6 prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed.” Boudette,
7 923 F.2d at 756. The second is discretionary: if good cause is not established, the district court may
8 extend time for service or dismiss without prejudice. See id. at 512, 514.

9 Plaintiffs have shown good cause based on excusable neglect, as there was a reasonable lack
10 of clarity as to what action the Court required to effect proper service. Although Plaintiffs
11 misinterpreted the Court’s instruction on service, the Court did not sua sponte address Plaintiffs’
12 attempted service at the time Plaintiffs filed their Notice of Service by Email (#10), or in granting
13 their Motion for Default Judgment (#22).

14 Additionally, Defendant having to litigate the case on the merits rather than benefitting from
15 dismissal is not prejudice adequate to grant Defendant’s motion. Accordingly, the Motion to Dismiss
16 Action under Rule 12(b)(5) for insufficient service of process is denied. The Court grants Plaintiffs a
17 120 day extension to effect service in compliance with Rules 4 and 5.

18 IV. Conclusion

19 Accordingly, IT IS HEREBY ORDERED that Defendant’s Motion to Set Aside Entry of
20 Default and Default Judgment (#27) is **GRANTED**;

21 IT IS FURTHER ORDERED that Defendant’s Motion to Quash Summons Issued and
22 Complaint(#28) is **GRANTED**;

23 IT IS FURTHER ORDERED that Defendant’s Motion to Dismiss Action (#29) is **DENIED**;

24 Plaintiffs shall have 120 days from the entry of this order to serve the summons and
25 complaint, in compliance with Federal Rules of Civil Procedure 4 and 5.

1 IT IS FURTHER ORDERED that the Clerk of the Court **VACATE** the Permanent
2 Injunction and Default Judgment (#22).

3 DATED this 9th day of June 2015.

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6 Kent J. Dawson
7 United States District Judge
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